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# WORKFARE OR WORKHOUSE? OCCUPATIONAL HEALTH AND SAFETY UNDER ONTARIO WORKS

SCOTT MCCROSSIN\*

## RÉSUMÉ:

Cet article analyse le statut juridique des participants aux programmes de travail obligatoire lorsqu'ils subissent une blessure au cours de leur placement professionnel. On y aborde tout particulièrement leur statut en vertu de la *Loi sur la santé et la sécurité au travail* et de la *Loi sur les accidents du travail*. En vertu des lois régissant les bénévoles, la responsabilité d'occupant et les asiles de pauvres de la *Poor Law England*, leur statut est également étudié pour nous donner un nouvel éclairage sur la nature de cette relation dans les programmes de travail obligatoire. Cet article établit que les participants aux programmes de travail obligatoire sont sans doute couverts par les lois mentionnées plus tôt et que les lois concernant la responsabilité d'occupant et les asiles de pauvres aident également à définir leur statut.

## I. INTRODUCTION

With the implementation of "Ontario Works", many of the province's poor will now have to work in order to receive social assistance benefits.<sup>1</sup> There has been ongoing debate between people who believe that welfare recipients should give something back to society in exchange for assistance from the state, and those who view such requirements as punitive and degrading in nature, arising from economic systems wholly beyond the control of the poor. The debate is not a

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\* Copyright 1997, Scott McCrossin. Scott McCrossin is a member of the 1997 graduating class of Osgoode Hall Law School (OHLS). The author would like to thank Professor Judy Fudge of OHLS and Ian Morrison of the Clinic Resource Office in Toronto for reviewing earlier drafts of this article, as well as Professor Harry Glasbeek for his helpful comments during its preparation. The author also gratefully acknowledges his participation in the Intensive Programme in Poverty Law at Parkdale Community Legal Services for having provided much of the knowledge and desire to undertake study in this area.

1. Since October 1, 1995, the maximum General Welfare Assistance available to a single, employable person in Ontario has been \$520 per month. This is comprised of a "basic needs allowance" of \$195 for food, clothing, etc. and a maximum "shelter allowance" of \$325 for housing.

new one. Indeed, the "workfare" of the 1990s very much resembles the "work tests" of the 1880s and 1890s whereby all single men seeking aid in Toronto were required to give several hours' labour breaking stone or sawing wood in exchange for a bowl of soup, six ounces of bread, and a night's shelter.<sup>2</sup>

From whatever side one approaches the issue, workfare raises important legal questions. In all respects, workfare participants resemble employees in terms of the work that they are required to perform. However, they are not treated as such, having been exempted from most legislated employment standards.<sup>3</sup> In the absence of such statutory protections, questions arise as to what restrictions will prevent the exploitation of workfare participants. The effects of workfare on the rest of the labour market is also of interest. Will workfare replace other jobs with less expensive labour, and put downward pressure on wages and employment standards overall? After all, the cost of labour is not only measured by wages, but also by the cost of compliance with other work standards. Exemption from these standards has the potential to affect the entire labour market, with effects ranging from the increased endangerment of the health and safety of workfare participants to the subsequent erosion of these protections for ordinary wage-labourers. Yet the legal status of workfare participants remains far from clear, and thus, correspondingly, so too does that of their employers.

For social assistance recipients, these questions are of immediate concern. Workfare participants who breach the terms or expectations of their placements will be sanctioned by social assistance administrators, with penalties including the loss of their benefits for up to six months. If standards set in protective workplace legislation are violated but held not to apply to these workers, their choice not to fulfil workfare obligations due to these violations may not safeguard them, resulting in the loss of their only source of income. With regard to labour legislation, workers and employers alike have rights and duties under these laws and failure to abide by them can result in both monetary and penal sanction. It is therefore critical to understand the position of workfare participants in relation to these laws.

In the words of Community Services Minister Janet Ecker, workfare is in a "legal grey area".<sup>4</sup> It is the purpose of this article to help demystify this area by

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2. J. Struthers, "Can Workfare Work? Reflections from History" (Ottawa: Caledon Institute of Social Policy, 1996) at 2.
  3. O. Reg. 384/96 exempts workfare participants from all aspects of the *Employment Standards Act*, R.S.O. 1990, c. E.14 [hereinafter ESA].
  4. M. Mittelstaedt, "Workfare Exempt from Protections" *The [Toronto] Globe and Mail* (2 October 1996) A4.

exploring the legal status of workfare participants, particularly in relation to the *Occupational Health and Safety Act*<sup>5</sup> (OHSA) and the *Workers' Compensation Act*<sup>6</sup> (WCA). In addition, the laws that relate to volunteers, occupiers' liability, and the workhouses of Poor Law England will be considered due to their potential to offer insight into the nature of the workfare relationship.

### Overview of Ontario Works

Ontario Regulation 383/96 significantly amended the General Welfare Regulation<sup>7</sup> in order to introduce a mandatory work-for-welfare scheme to Ontario. The new program, called "Ontario Works" by the government but more popularly known as "workfare", is actually comprised of three components. These include "employment support activities", "employment placement activities", and "community participation activities".<sup>8</sup>

Employment Support, in the government's words, "includes activities that support participants in their efforts to become job-ready and access their shortest route to paid employment, such as structured job search activities, basic education, and job-specific skills training."<sup>9</sup> This is the first stage of Ontario Works in which a new-comer to the social assistance system will be required to participate. Lasting up to four months, it is intended to facilitate re-entry into the workforce and ranges from structured job searches (including the provision of resources to facilitate this) to language education (English or French).

Employment Placement, on the other hand, "is intended for participants who are ready to find and maintain paid employment and to assist participants interested in self-employment to develop business enterprises."<sup>10</sup> This will be carried out through "job placement agencies" in the private or non-profit sector which will be remunerated "on a performance basis using a share of the funds that would otherwise be paid out in social assistance to the participant."<sup>11</sup> This element of the program will operate in tandem with the other two components.

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5. *Occupational Health & Safety Act*, R.S.O. 1990, c. O.1 [hereinafter OHSA].

6. *Workers' Compensation Act*, R.S.O. 1990, c. W.11 [hereinafter WCA].

7. *General Welfare Assistance Regulations*, R.R.O. 1990, Reg. 537.

8. *Ibid.*, s. 4.3.

9. Ministry of Community and Social Services, "Program Guidelines for Early Implementation of Ontario Works," (August 1996) at 12 [hereinafter "Program Guidelines"].

10. *Ibid.* at 16.

11. *Ibid.*

Third, and most important for this article, is the program component known as Community Participation. This is the euphemism for what most people think of as workfare. As explained in the Program Guidelines:

A Community Participation placement is any unpaid community service activity under the direction of officials within communities and/or public or non-profit organizations. It can be sponsored by communities and/or public, non-profit or private-sector organizations. It includes a self-initiated placement proposed by a participant, i.e. a participant can develop his or her own community placement under the direction of a participating organization.<sup>12</sup>

Of particular note here is that private-sector organizations are not eligible to directly "employ" workfare participants. They are restricted to providing in-kind support to work placements, for example, through the donation of building tools and supplies.

The program guidelines limit participants to a maximum of six months in any one placement, "except where a specific plan of skill training is in place, in which case a participant may spend up to eleven months in the placement".<sup>13</sup> No more than 70 hours per month may be spent at a placement, while there is no minimum. In no case may a participant be required to participate for more hours than what would be determined by dividing his or her benefit level by the minimum wage "plus four percent vacation pay".<sup>14</sup> Of these requirements, only the 70 hour per month maximum was actually written into the General Welfare regulations by Ontario Regulation 383/96.<sup>15</sup> Clearly, the "minimum wage calculation" is meant to avoid criticism that workfare is unacceptably exploiting workers. Yet it is apparent that fair wages for the work performed (as determined by comparison with wages paid to regular employees) are not at all factored into deciding a participant's workfare obligation.<sup>16</sup> Furthermore, because benefit levels are based on need and family size, these calculations may be discriminatory in other respects as well.<sup>17</sup>

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12. *Ibid.* at 10.

13. *Ibid.*

14. *Ibid.* at 38.

15. R.R.O. 1990, Reg. 537, s. 4.3(5).

16. On this point, it may be worth considering the *Government Contracts Hours and Wages Act*, R.S.O. 1990, c. G.8. The Act calls for the payment of "fair wages" for all employees on construction or demolition jobs that are contracted-for or financially assisted by the Government of Ontario. *Quaere* the status of workfare in relation to this Act.

17. See I. Morrison, "Ontario Works—Community Participation: A Preliminary Assessment" (Toronto: Clinic Resource Office, July 1996) at 6.

It is also important to note that each workfare participant will be encouraged to sign a "participation agreement" which will set out the expectations of each community placement and be used to keep track of the participant's progress. Most significantly, this document will serve as a "form of notice" to participants about their obligations under Ontario Works,<sup>18</sup> including the "specific activities agreed to".<sup>19</sup> This may become important for participants who breach these terms and then try to argue that it was reasonable for them to do so. Under section 4.3(7) of Regulation 537, individuals who refuse to participate "without reasonable cause" or who are not making "reasonable efforts" to fulfil their placement requirements "shall" be refused assistance for three months—unless they have been sanctioned previously, in which case the period "shall" be six months pursuant to section 4.3(9). Obviously, knowing what is "reasonable" will be of vital importance to workfare participants and their advocates.

Finally, it is important to understand the relationships between the various parties to the Community Participation component of Ontario Works in order to understand its legal situation. This will also be useful because this article largely adopts the terminology used by the government in regard to workfare in order to minimize confusion. Thus "service delivery agents" (municipalities for the foreseeable future) deliver the entire Ontario Works program—including social assistance benefits. These agents enter into "placement agreements" with "participating organizations", which are public or non-profit organizations, to offer "placements" to workfare "participants". The participants themselves report to the service delivery agents and it is with these agents that they will be encouraged to sign "participation agreements". Participants and the participating organizations with which they actually work appear to have no formal relationship under the program, and any discipline or other proceedings must go through the service delivery agents. As can be seen, the many relationships established by the workfare program create a complex web, and ascertaining their true meanings and implications will be one of the first priorities in any litigation relating to workfare.

## II. IS WORKFARE EMPLOYMENT?

In September 1996, the Ontario government published regulations which purport to define the status of workfare participants in relation to the OHSA and the ESA. However, it should not be assumed that these regulations are the last word on the matter, with a more complete exploration of the legal nature of

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18. See "Program Guidelines", *supra* note 9 at 23.

19. *Ibid.* at vi (Appendix B).

workfare being in order. First, therefore, I will consider how workfare fits into common law definitions of "employment". I will then examine how workfare relates to the OHSA and WCA as they modify the common law, including consideration of the aforementioned regulations where relevant.<sup>20</sup> I have adopted this approach because it affords the clearest picture of the status of workfare in relation to other potential concepts of employment. It is also useful in gaining an understanding of what the legal status of workfare participants might be in the absence of statutory intervention, or in the case that such legislation is held to be inapplicable.

### A. Common Law

The starting point in determining whether a relationship constitutes one of employment is the common law. Statutory definitions then either supplement or modify this understanding. *Montreal v. Montreal Locomotive Works Ltd.*<sup>21</sup> is generally accepted as the best statement of the law in Canada on this point. Lord Wright established the "fourfold test" in this case, holding:

In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. . . . It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.<sup>22</sup>

Applying this test, it is clear that control of workfare participants' actions does not rest in themselves. They will be responsible to the service delivery agents in meeting their eligibility requirements for social assistance, while subject to the direction of the participating organizations once at the placement site. As MacKenna J. explained in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance*:<sup>23</sup>

Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to

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20. Some good preliminary work has already been done with regard to the WCA, which it will be endeavoured not to repeat here. See generally Morrison, *supra* note 17 at 23ff.

21. [1947] 1 D.L.R. 161 (P.C.) [hereinafter *Montreal Locomotive*].

22. *Ibid.* at 169.

23. [1968] 2 Q.B. 497, [1968] 1 All E.R. 433 [hereinafter *Ready Mixed Concrete* cited to Q.B.].

make one party the master and the other his servant. The right need not be unrestricted.<sup>24</sup>

Although one might argue that workfare participants voluntarily apply for social assistance and therefore have “control” over this matter, this is ostensibly the position of ordinary wage-labourers entering the marketplace as well, yet no one would suggest that they are therefore not “employees”. Clearly this is not what is meant by control, as illustrated above.

The only real question is *who* exercises the control—the service delivery agents or the participating organizations. The answer to this question could vary according to the subject matter in question, and is difficult to answer devoid of context. It will therefore be addressed in more detail later. The other factors in *Montreal Locomotive*—ownership of tools, chance of profit, risk of loss—once again do not fall within the purview of the workfare participant. Under the fourfold test therefore, workfare participants would be considered employees, although of whom remains unclear at this point.

*Ready Mixed Concrete* sought to clarify further the essence of the employment relationship. The Court held in part:

An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, *it will be some other kind of contract*, and the person doing the work will not be a servant.<sup>25</sup>

Here the test was conceptualized in terms of distinguishing between different kinds of contracts, as opposed to whether a contract existed at all. It is often the case that contracts *of* service are sought to be differentiated from contracts *for* service. This distinction under the common law is probably not important for the purpose of workfare, where it may be that no contract exists whatsoever.

Nonetheless, other common law tests of employment in addition to the fourfold and control tests suggest that workfare participants are employees. These include the “part and parcel”<sup>26</sup> and the “economic reality”<sup>27</sup> tests. It is true that workfare is a very special type of employment, however, due to the possible

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24. *Ibid.* at 515.

25. *Ibid.* at 516–517 [emphasis added].

26. See *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248 at 295, per Denning L.J.

27. See *U.S. v. Silk*, 331 U.S. 704 (1946).



lack of a contract with an employer. As well, it remains to be determined exactly who constitutes a workfare participant's employer, as the particular circumstances of any given situation may be needed to answer that question.<sup>28</sup>

### B. *Occupational Health & Safety Act (OHSA)*<sup>29</sup>

The first piece of legislation in relation to which the status of workfare participants will be considered is the OHSA. It will immediately be noted that the OHSA is remedial legislation, and therefore can be assumed to have been enacted in order to depart from the common law. Nonetheless, the common law is the starting point from which its departure must be measured. In so doing, however, attention should be given to the fact that common law tests of employment have been criticized as being mainly useful in making determinations of liability under tort law, with much less relevance to labour legislation. In the context of collective bargaining, Professor Arthurs has observed:

any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. ... But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose.<sup>30</sup>

This criticism calls for a much more purposive interpretation of labour legislation in general. As a result, some labour arbitrators have been inclined to supplement *Montreal Locomotive Works* with the "part and parcel" or "organizational" test in deciding whether an employment relationship exists.<sup>31</sup>

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28. An example would be the case of injury to a third party. While the question of agency and vicarious liability will come into play, that topic is largely beyond the scope of this article, which is concerned about protective workplace legislation. Nonetheless, the question of who is liable for the torts of workfare participants is most interesting. Some insight into this question may be found in Part III(c), below, with the discussion of the status of paupers under the English Poor Law.

29. *Supra* note 5.

30. H. W. Arthurs, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16 U.T.L.J. 89 at 95 [footnote omitted].

31. See generally R. M. Parry, *Employment Standards Handbook*, 2nd ed. (Aurora: Canada Law Book, 1996) at 1-3.

Of further note is that the OHSA has been subject to a regulation concerning workfare.<sup>32</sup> However, it pertains to a relatively specific part of the OHSA, with its lack of broader application suggesting that the government does indeed view workfare participants as being covered by the rest of the Act. But before moving on to a discussion of this regulation, the notion of "employment" contemplated by the OHSA will first be explored.

The determination of this matter is important, and not just from the standpoint of employers' responsibilities towards their workers. Workers too have duties under the OHSA. These include the duty to comply with the Act and its regulations, for example, the duties to use appropriate safety equipment and to report workplace dangers to the employer. Fulfilment of these obligations requires familiarity with the terms of the OHSA.<sup>33</sup> While prosecutions of workers for breaches of the Act are rare, that does not change their legal responsibilities. These workers have the right to know their standing, particularly since a person who contravenes or fails to comply with the Act is liable under section 66(1) to a fine of up to \$25,000 or imprisonment for up to 12 months, or to both.<sup>34</sup>

#### **"Worker"**

Under section 1(1) of the OHSA, "worker" is defined as:

a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like insti-

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32. O. Reg. 385/96.

33. To illustrate the implications of coverage, and the importance of understanding the scope of the definitions used under the Act, the following summary is provided. Sections 25 & 26 of the OHSA set out the duties of *employers*. They establish responsibilities in the area of provision of safe equipment, safety monitoring, education, *etc.*, towards *workers*. Similarly, section 28 sets out the duties of *workers* under the OHSA. As well, Part V of the OHSA (Right to Refuse or to Stop Work Where Health or Safety in Danger) applies to "a worker". Part VI of the OHSA (Reprisals by Employer Prohibited) also speaks only to "a worker" who has made a report under the Act, including such protections as those found in section 46 that no such worker shall be dismissed, disciplined, or otherwise coerced or intimidated. Only Part VII (Notices), Part VIII (Enforcement), and Part IX (Offences and Penalties) use the broader term "person", including section 66 which makes "[e]very person who contravenes or fails to comply with" the OHSA or Regulations liable to fine or imprisonment.

34. Note also the importance of compliance with the nationally coordinated Workplace Hazardous Materials Information System (WHMIS), which finds its genesis in ss. 33-42 of the OHSA and is more particularly set out in R.R.O. 1990, Reg. 860. Establishing standards and protections for those dealing with hazardous materials, the scheme also mandates worker education and training, as well as the disclosure of confidential business information in medical emergencies. Section 4(1) of Reg. 860 specifies that these and other provisions apply to "employers and workers".

tution or facility who participates inside the institution or facility in a work project or rehabilitation program

Of note is that this definition is not explicitly inclusive in scope. On the other hand, the term "worker" is used as opposed to "employee". Given the extensive case law interpreting the nature of the "employee-employer" relationship, it can be assumed that "worker" was used to denote a broader category of persons than that covered by "employee". This is especially true in light of the remedial nature of the OHSA, which as a result should be interpreted liberally and purposively in order to best achieve the objectives set out in it, in accordance with section 10 of the *Interpretation Act*.<sup>35</sup> It is also a principle of statutory interpretation that the law be interpreted as "always speaking", and it is arguable that the recent introduction of workfare should not lead to the exclusion of workfare participants from the OHSA's minimal protections, but rather that the Act should be read to include and recognize their status as workers. As Norman Keith, author of *Occupational Health and Safety Law*, states:

The meaning of the term "worker" in the O.H.S.A. is much broader than the legal meaning of the word "employee". A worker can be, but is not necessarily, an employee.<sup>36</sup>

Nonetheless, the definition is not without its restrictions. For example, the Ministry of Labour does not consider students on career training programs who receive monetary compensation while attending classes or while with an employer to be workers for the purposes of the OHSA:

While the students described receive some monetary compensation, their primary role at the college is to take part in an educational program. It is clear that they are not employees of the community college. Thus, students in Manpower training courses at community colleges are not workers for the purposes of the Act and are not covered by its provisions.<sup>37</sup>

Of course, this is only the Ministry's view. An adjudicator might interpret the matter differently if an appropriate case arose. Nonetheless, it should also be noted that workers in correctional facilities are explicitly excluded from the definition of "worker" in the Act. As a matter of policy, one must wonder why

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35. *Interpretation Act*, R.S.O. 1990, c. I.11.

36. N. A. Keith, *Occupational Health and Safety Law: A Complete Guide to the Law and Procedures, with Digest of Cases* (Aurora: Canada Law Book, July 1996) at 4-8.

37. *Ibid.* at 4-21, citing *Interpretation Opinions*, Legal Branch of Ontario Ministry of Labour (April 2, 1982) at 3; but also referring to *Interpretation Opinions*, Legal Branch of Ontario Ministry of Labour (September 22, 1982) at 2, for a contrary view.

they too should not be protected from unsafe working conditions. And as social assistance recipients become increasingly marginalized, there is no guarantee how their rights as workfare participants may be interpreted.<sup>38</sup>

It is also worth noting that the definition of "worker" under the OHSA includes the phrase "a person who performs work or supplies services for monetary compensation". While no mention is made of the word "contract", the concept of an exchange of money for work appears to be an essential element of the work relationship under the OHSA. Workfare participants arguably satisfy this criterion, performing work in order to maintain eligibility for social assistance, which may be one way of saying "for monetary compensation".

Therefore, workfare participants do seem to be "workers" under the OHSA, both from a public policy approach and under statutory interpretation. The more difficult task is identifying the employer.

#### **Who is the Employer under the OHSA?**

"Employer" is also defined in section 1(1) of the OHSA. It is said to mean:

a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services

On its own, this definition may not be of great assistance—saying that an employer is "a person who employs" borders on circularity and does not get us very far. On the other hand, a person who "contracts for the services of one or more workers" gets us a little farther along. But in the case of workfare, the complex web of workfare relationships comes into play. More specifically, the question of whether the "employer" has to contract with the worker directly, or whether instead can do so through another party, must be answered. In the workfare scenario, participating organizations contract with service delivery agents for the services of workfare participants, not with the participants themselves. Are they still employers for the purposes of the Act? Or in any case, perhaps participating organizations constitute employers under the OHSA by virtue of the fact that they "employ" workfare participants, in satisfaction of the first part of the definition. This interpretation is consistent with the earlier conclusion that workfare participants are employees within the meaning of the common law, and may be preferable.

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38. See for *e.g.* *Tozeland*, *infra* note 101 at 922, where the appellants argued that "[t]he position of a pauper may be analogous to that of a prisoner".

In addressing the question of who constitutes the employer, it is important to keep in mind the remedial purpose of the OHSA. According to Keith:

This statutory definition of an employer is broader than the traditional definition in the common law and in most employment law statutes. The definition of employer is exhaustive.<sup>39</sup>

This conclusion is supported by a 1992 decision of the Ontario Court of Appeal.

**R. v. Wyssen<sup>40</sup>**

The issue in this case was whether the OHSA applied to the employer of an independent contractor. The Court of Appeal overturned two lower court decisions in finding that the employer of an independent contractor was an employer for the purposes of the Act. This case is significant because it gives an expansive reading to the meaning of "employer" under the OHSA, both on a literal reading of the Act and also on public policy grounds. The three judges who heard the case concurred in the result, but divided 2-1 in their reasons. Blair J.A. (Dubin C.J.O. concurring) considered how "employer" must be read within the context of the entire Act, finding:

Here the definition "employer" must be considered in context with the enforcement provisions in s. 14(1) and (2). These underline the intention of the legislature to make an "employer" responsible for compliance with the Act and Regulations....

The duties imposed on an "employer" by s. 14(1) and (2) are undeniably strict and, in my opinion, non-delegable. The legislature clearly intended to make an "employer" responsible for safety in the "workplace". The employer's duty under the Act and Regulations cannot be evaded by contracting out performance of the work to independent contractors.<sup>41</sup>

Blair J.A. also reflected on former definitions under workplace safety legislation that were replaced by the consolidation of the legislation in 1979. He found:

The replacement of the former restrictive definitions of "employer" by the expansive definition in the Act reflects the clear intention of the legislature to make employers responsible for ensuring safety in the workplace.<sup>42</sup>

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39. Keith, *supra* note 36 at 4-8.

40. (1992), 10 O.R. (3d) 193, 58 O.A.C. 67, 9 C.O.H.S.C. 133 (C.A.) [hereinafter *Wyssen* cited to O.R.].

41. *Ibid.* at 198.

42. *Ibid.* at 199.

One might therefore purposively read the OHSA to find the "employer" to be the actual on-site employer at the workplace, that is, the participating organization.

However, attention should be given to the separate judgment of Finlayson J.A., in which he stated that it may be possible to challenge the OHSA's definition of "employer" under section 7 of the *Canadian Charter of Rights and Freedoms*<sup>43</sup>. He found that such a challenge could arise due to the expansive reading given to "employer" in combination with the potential penal consequences for breaching the Act, particularly if the term "is so lacking in precision that it does not give sufficient guidance for legal debate".<sup>44</sup> He concluded:

This tension between the worthwhile objectives of the Act and the *Charter* rights of those who are swept in under the all-encompassing definition of employer deserves to be explored.

Unfortunately, these promising *Charter* arguments were not raised at any stage of these proceedings and they cannot be dealt with now. We must await another day and a full record before subjecting this piece of legislation to *Charter* scrutiny.<sup>45</sup>

It is possible that such "promising" arguments may be applied to a case arising from workfare, should the opportunity arise.

Nonetheless, the jurisprudence suggests that the actual on-site employer, which is to say the participating organization, constitutes the employer for the purposes of the OHSA. This most clearly meets the purposes of the Act, with only the participating organization exercising the day to day control it envisions. This is also the intention expressed in the Program Guidelines:

Employers that participate in Ontario Works have the same responsibilities for occupational health and safety towards participants as they do toward their own workers. Employers remain liable for orders made by Ministry of Labour health and safety inspectors to correct occupational health and safety hazards and to fulfill employers' obligations under the *Occupational Health and Safety Act* towards participants, and for prosecution and the imposition of penalties upon conviction for an offence under that Act.

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43. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

44. Wyssen, *supra* note 40 at 202.

45. *Ibid.* at 203.

Participants have the right to refuse to do tasks they consider to be unsafe by following the procedures described in the *Occupational Health and Safety Act*.<sup>46</sup>

However, the responsibility does not end with the participating organizations. Service delivery agents retain much control over the placements and the participants in them. They approve participating organizations, and discipline workfare participants for failure to fulfil the "reasonable" expectations of their placements. Therefore, service delivery agents must share some responsibility for ensuring that workfare placements are satisfactory and meet the health and safety standards required by law. Again, this is consistent with the Program Guidelines, which state:

Service delivery agents must ensure that participating organizations are in compliance with applicable occupational health and safety legislation, regulation, and other relevant standards.<sup>47</sup>

As a result, any fault or negligence in this duty might result in service delivery agents being held responsible along with participating organizations for violations of the OHSA.<sup>48</sup> While the agents may be subject to penalty under the Act, should an action by an injured workfare participant lie in tort,<sup>49</sup> they will also share liability in this regard.<sup>50</sup>

### **Regulation 385/96**

Ontario Regulation 385/96, made pursuant to the OHSA, purports to modify section 9(2) of the Act. This section mandates a "joint health and safety committee" comprised of workers and managers "at a workplace at which twenty or more workers are regularly employed", as well as at workplaces with fewer than 20 workers if they work with certain designated substances. Regu-

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46. "Program Guidelines", *supra* note 9 at 37.

47. *Ibid.*

48. This is not to say that the OHSA itself is safe from change. The Act is currently under review by Ontario's pro-business Tory government, and "a leaked cabinet document shows that the government plans to reconsider the right to refuse unsafe work, to give employers the power to determine who sits on workplace health-and-safety committees, and to let employers control safety inspections." See "Right to Refuse Work Safe" *The [Toronto] Globe and Mail* (28 November 1996) A5.

49. The applicability of workers' compensation legislation to workfare is discussed in Part II(c), below.

50. Section 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, directs that when more than one party is found guilty of negligence in connection with the same harm, the tortfeasors shall be held "jointly and severally liable".

lation 385/96 is structured so as to exclude workfare participants from these counts. The Regulation establishes a definition of "ordinary worker", with its only characteristic being that it does not include workfare participants.<sup>51</sup> The Regulation then continues:

2. A workplace at which fewer than 20 ordinary workers are regularly employed is exempted from clause 9 (2) (a) of the Act.

Section 3 of the Regulation makes a similar provision with regard to section 9(2)(c) of the OHSA.

The Regulation continues by excluding workfare participants from section 9(12) of the OHSA, which requires certification in accordance with the Act for a minimum number of joint health and safety committee members. This section of the Regulation is of particular interest because it seems to exclude not only workfare participants from the count but also *volunteers*, unlike the amendments made to section 9(2) of the Act which specify workfare participants only. This extra exclusion is accomplished through the definition of "volunteer worker" under Regulation 385/96:

"volunteer worker" means a worker who performs work or supplies a service but who receives no monetary compensation for doing so other than an allowance for expenses or an honorarium.

For example, the new regulation exempts from subsection 9(12) of the OHSA:

- A workplace at which fewer than 20 ordinary workers (who are not volunteer workers) are regularly employed.<sup>52</sup>

While the wording of this particular section of the regulation is not as clear as it could be, it appears to exclude both workfare participants and volunteers from the count pursuant to which a finding of 20 workers requires certification of at least one of them.

This regulation is important not only in its attempt to exclude these workers from coverage under the OHSA, but also because it draws a statutory distinction between workfare participants and volunteers. It seems to be the first statutory definition of "volunteer" with regard to labour legislation in Ontario. As well, the specific statutory definition and exclusion of workfare participants and

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51. O. Reg. 385/96, s. 1 states: "'ordinary worker' does not include a worker participating in community participation activities within a program established under subsection 4.3 (3) of Regulation 537 of the Revised Regulations of Ontario, 1990 ('General') made under the *General Welfare Assistance Act*."

52. O. Reg. 385/96, s. 4(1).



volunteers from only certain subsections<sup>53</sup> of the OHSA suggests that both of these types of worker are in fact covered by the rest of the Act.<sup>54</sup> This lends support to the broad reading of the OHSA suggested above, recognizing the Act's remedial purpose and the compelling public policy reasons for its wide application. What is of further interest is that volunteers are *not* excluded, unlike workfare participants, from subsections 9(2)(a) and 9(2)(c) of the Act. Thus, it seems, in counting workers for the purposes of determining whether a joint health and safety committee is required under the OHSA, volunteer workers *are* to be included.<sup>55</sup> However, these volunteers are then excluded from the count in the subsequent determination of whether the 20 workers required to compel certification are present. Workfare participants are, of course, excluded from both of these counts.

### Regulation 385/96 is *ultra vires* the OHSA

Despite the helpfulness of Regulation 385/96 in making clear the coverage of workfare participants under the OHSA, there is some question as to its validity. The regulation seems to be *ultra vires* its governing act. OHSA section 70(1) authorizes the making of "such regulations as are advisable for the health or safety of persons in or about a workplace." It would be hard to argue that the *exclusion* of a class of workers from part of the Act could be so advisable. Section 70(2)(1) goes on to specify that "[w]ithout limiting the generality" of section 70(1), regulations may be made "defining any word or expression used in this Act or the regulations that is *not defined* in this Act."<sup>56</sup> "Worker" is defined in the OHSA, and as already argued, encompasses workfare participants within its meaning. Therefore, the Lieutenant Governor in Council does not have

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53. This is not to undermine the role of joint health and safety committees under the OHSA. As the *Report of the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario*, vol. 2 (Toronto: Ministry of the Attorney General, 1984) stated at 512: "the committee structure is critically important to ... Ontario's health and safety system".

54. Admittedly, this deduction is of limited value, but see R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 246: "Where the provision to be interpreted appears in the enabling Act, the regulations are often ignored. Because regulations are a subordinate form of legislation, usually made after the enabling Act has been passed, they have limited value in interpreting provisions of the Act. In appropriate circumstances, however, where the Act and the regulations are closely meshed so as to form an integrated scheme, provisions from both are interpreted in the light of that overall scheme." [footnote omitted]

55. *Expressio unius est exclusio alterius* ("Mention of one thing implies exclusion of another").

56. Emphasis added.

statutory authority to limit the meaning or application of this term within the Act.

Regulation 385/96 attempts to get around this by legislating with respect to *workplaces*, not *workers*. This is necessary both for the preceding reason, and also because none of the 49 categories enumerated under OHSA section 70(2) in relation to which regulations may be made speak of "workers" or "classes of workers", but rather only of "employers" or "classes of employers". Thus, for example, does s. 70(2)(12) allow for regulations "exempting any *workplace*, industry, activity, business, work, trade, occupation, profession, constructor or *employer or any class thereof* from the application of subsection 9(2)"<sup>57</sup>, which is in fact one of the sections from which workfare participants have purportedly been excluded by Regulation 385/96. It will be noted that Regulation 385/96 exempts *workplaces* having fewer than a set number of "ordinary workers". Because the regulation cannot not exempt workers *per se*, it attempts to exempt workplaces. But it defines these workplaces in relation to their workers, and invokes a different meaning of worker than that given under the governing act. And as already noted, the regulations cannot define a word already defined in the Act. The government is trying to bring in through the back door what it cannot bring in through the front: *quando aliquid prohibetur ex directo, prohibetur et per obliquum*.<sup>58</sup>

Therefore, there is a strong argument that Regulation 385/96 is *ultra vires* the Act and is invalid for that reason.<sup>59</sup> As a result, workfare participants must be included in any count of workers relating to the establishment of joint health and safety committees under the OHSA. Should volunteers also be held to come within the definition of "worker" under the OHSA, their exclusion by this regulation would also be null and void.<sup>60</sup>

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57. Emphasis added.

58. "When anything is prohibited directly, it is prohibited also indirectly."

59. Of course, this finding limits (or eliminates) the validity of the suggestion made earlier that the regulation can be used to support a reading of the OHSA that includes workfare participants within its definition of "worker". Nonetheless, it would seem that any party seeking to uphold the validity of the regulation would have to concede that participants are covered by the rest of Act's provisions, which may be of strategic value.

60. There is a problem with regard to volunteers, however. As noted earlier, the definition of "worker" under the OHSA contemplates some form of "monetary compensation" being given in exchange for the work performed. Unless the Act is read broadly enough to waive this requirement (and there may be public policy reasons for so doing), volunteers presumably are not covered by the Act nor can they be included in it by regulation.

### C. *Workers' Compensation Act (WCA)*<sup>61</sup>

The question of whether workfare participants are covered by the WCA is also of key importance, and perhaps most interesting to participating organizations. This is because coverage under the WCA requires regular financial contributions by employers on behalf of employees, and also because employees covered by the WCA are barred by section 16 of the Act from suing their employers for any injuries suffered in the course of their employment.

The government is clear in its intention that workfare participants will be covered by the WCA, with agencies that direct Community Participation placements having "the same responsibility to carry insurance for personal injuries attributable to workplace accidents toward participants as they do toward their own employees."<sup>62</sup> The situation contemplated by Ontario Works is ideal from the point of view of participating organizations, however, with WCA costs covered by the government while they remain protected from civil suit. This will therefore likely only be challenged in the case of a workfare participant injured on the job who wishes not to be covered by the WCA in order to pursue her rights civilly in hope of greater gain. In any event, the starting point in finding out the answers to the questions surrounding this matter is the Act itself.<sup>63</sup>

To begin with, under section 1 of the WCA, "employer":

includes every person having in the person's service under a contract of hiring or apprenticeship, written or oral, express or implied, any person engaged in any work in or about an industry

Section 1 also defines "worker", stating the term:

includes a person who has entered into or is employed under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise

Both of these definitions are inclusive, and thus not restricted to the enumerations given. In addition, like the OHSA, the WCA uses the term "worker", which has a broader meaning than does "employee". It is further arguable that the WCA

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61. *Supra* note 6.

62. "Program Guidelines", *supra* note 9 at 37.

63. It should be noted that the WCA is facing major legislative changes scheduled to take effect on July 1, 1997 which will affect entitlements and redefine some key terms of the Act, including changing the name of the Workers' Compensation Board to the Workplace Safety and Insurance Board. See J. Rusk, "WCB Benefits, Premiums to Drop" *The [Toronto] Globe and Mail* (27 November 1996) A6.

is a statute *in pari materia* with the OHSA, as the health and safety legislation makes reference to the WCA at a key place—the source of funding for its administration (section 22). As a result, the conclusion that workfare participants are covered by the OHSA strengthens the argument that they are also covered by the WCA. As well, the WCA is remedial legislation and as such requires a liberal interpretation.

Nonetheless, in both the definitions of “employer” and “worker” under the WCA, it seems that some form of contract is contemplated. And once again, we are faced with the task of untangling the workfare relationship in order to see how the notion of contract fits into the Act. It is difficult to find a contract of or for service in the case of a workfare participant, at least as traditionally conceived. However, it is impossible to ignore that at some level, workfare participants are providing their labour in exchange for social assistance benefits. The question is whether a legal remedy would lie for a failure or refusal to provide benefits if the required work is actually performed, and if so, what the nature of the remedy would be.<sup>64</sup> The source of the confusion may be that it remains unclear if social assistance is monetary compensation for the labour performed, or alternatively if the labour is a condition of eligibility for the social assistance. It appears to be the latter. General Welfare Assistance remains an *entitlement*—the law states that it “shall” be provided to any person in need “who is eligible for such assistance.”<sup>65</sup> Workfare is merely one of the conditions of eligibility, as established by the regulations. In any event, the importance of finding a contract may be overemphasized, especially considering the several reasons already given why workfare falls within the WCA’s scope of coverage.

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64. To this end, it may be helpful to consider the distinction drawn under the Poor Law between *contractual* employment and *statutory* employment, in Part III(c), below. On the other hand, see *Ghent v. Unemployment Insurance Appeals Board*, 183 Cal. App. 3d 1167, 228 Cal. Rptr. 631 (Ct. App. 1986) [hereinafter *Ghent* cited to Cal. Rptr.] at 635: “The real issue of this case is the status of the work performed and the aid received. . . . We hold that Ghent’s participation in the County’s work relief program and receipt of aid therefrom did not establish either a statutory or common law employment relationship between the County and Ghent.”

65. *General Welfare Assistance Act*, R.S.O. 1990, c. G.6, s. 7(1). On this point, also consider the argument of the welfare department in *Ghent*, *ibid.* at 632: “Under California Law relief payments are mandatory where the individual applicant meets the condition of eligibility. Any work which may be required of a recipient of relief is a condition subsequent and not precedent to the determination of need and the allowance of aid. The aid is not wages in the first instance but a subsistence allowance nor does it become wages when services are performed by the recipient on a relief project. Relief project work is created for rehabilitation and morale purposes. Engaging in such does not place the claimant in employment nor establish a bona fide employer-employee relationship.”

It will also be noted that section 63 of the WCA does give the Workers' Compensation Board (WCB) power to make regulations in relation to Part I of the Act (Compensation), subject to the approval of the Lieutenant Governor in Council. There is not any provision for the government to bypass the Board and directly make regulations itself. In reality, however, a government wishing to make a change will seek the Board's cooperation, which is given as a matter of routine. Presumably, therefore, section 63 would be the basis for any wholesale designation of workfare participants as "workers" for the purposes of the Act. But section 63 does not specifically authorize any regulations relating to the meaning of "worker". Only the definition of worker itself does so, where section 1 allows the term to include:

- (c) a person deemed to be a worker of an employer by a direction or order of the [Workers' Compensation] Board ...

It would seem that any wholesale designation of a class of persons to be "workers" under the Act would have to be in addition to the power of the Board under the above definition. This deeming provision seems only to contemplate an individual person. Other sections of the WCA and other labour legislation speak of *classes* of persons, workers, and employers. Part (c) of the definition of "worker" does not do so, and therefore seems unable to authorize the Board to make a wholesale declaration that all workfare participants are workers for the purposes of the WCA. In order to accomplish this, the definition would have to read "a person *or class of persons* deemed to be a worker" by the Board. Thus, it appears that the WCB only has power to make such designations on a case by case basis, with a broader ability to effectively expand or amend the Act's definition of "worker" being *ultra vires* the Board.

### Who is the Employer under the WCA?

There remains the question of who the employer of a workfare participant is under the WCA. It might be argued that service delivery agents are the employers, which would protect the integrity of the workfare program by easing the fears of participating organizations in the event that a workfare participant attempts a civil action. In support of such a contention, one could point to the participation agreements which the service delivery agents will hope to have signed with each workfare participant. This could be coupled with the fact that service delivery agents share responsibility with participating organizations to ensure the proper administration of the WCA.<sup>66</sup> On the other hand, it could be argued that the government is the employer, particularly considering that it is the government that has required the participant to work in the first place and

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66. "Program Guidelines", *supra* note 9 at xiv (Appendix E).

that is paying the workers' compensation costs of workfare participants. In either case, the role of the participating organizations could be explained with reference to section 3 of the WCA, which deals with "seconded workers".<sup>67</sup>

In *Humberstone v. Northern Timber Mills*<sup>68</sup>, which MacKenna J. quoted in *Ready Mixed Concrete*, Dixon J. had to determine whether a person was a servant for the purposes of workers' compensation. He held:

The question is . . . whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.<sup>69</sup>

This formulation can also assist in determining who the employer is with regard to the WCA, and supports the conclusion that it is the service delivery agent. The agents have ultimate control of the workfare placement, approving each participating organization and the terms of each participant's placement. Once the workfare program is in place, the government's authority is too remote to consider it to be the employer for the purposes of the Act.

On the other hand, it may be that the participating organizations are the employers. This would fit naturally with the workplace safety scheme overall, similar to what was noted with regard to the OHSA. However, it does not seem that such a holding would reflect where the responsibilities under the WCA actually lie. In the end, however, the question may only be important in so far as employers under the Act are protected from civil suit by section 16. As long as workfare participants are held to be covered by workers' compensation, it may not be important for them to ascertain precisely who their employer is, because whoever it is, the participant has recovered and presumably therefore is barred from suing. In the alternative, the workfare participant may be held not to be covered by the WCA, in which case the determination of who the employer is under the Act may be unnecessary, with other tort principles coming into play.

***Blum v. Glastonbury Housing Authority***<sup>70</sup>

Notwithstanding any determinations of who constitutes a "worker" or "employer" under the WCA, a court may nonetheless decide not to bar a

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67. Section 3 states: "Seconded workers: Where the services of a worker are temporarily lent or hired out to another person by the person with whom the worker has entered into a contract of service, the latter person is deemed to continue to be the employer of the worker while the worker is working for the other person."

68. (1949) 79 C.L.R. 389.

69. *Ibid.* at 404.

workfare participant from suing civilly if injured on the job. Workers' compensation is part of the ostensible employment bargain, seen as an efficient and predictable compromise to meet the needs of employers and employees alike, especially given the common law alternative. But a person injured while on a workfare placement has not participated as freely in making this bargain, and it is therefore arguable should not give up common law rights to sue for more than what is available from workers' compensation. Only one case could be found on this point, an American decision in which the court held:

worthwhile as these [workfare] programs may be (and it is not for the court to have an opinion on that, it is the law) it is also true that workers in these programs do not represent free labor entering the marketplace able to chose [sic] their employer and to some extent negotiate the terms of their employment. Thus some at least of the underpinnings on which the Worker's Compensation system is based do not exists [sic] so query how fair it is to require such workers to give up their common law right to sue.<sup>71</sup>

In this case, the injured worker had already recovered under the workers' compensation system. The judge did not find that to be an obstacle, however, stating that the plaintiff would merely have to reimburse workers' compensation from any recovery he subsequently made in a civil action. Therefore, it is not certain that participating organizations will be protected from actions in tort for injuries suffered by workfare participants.

Furthermore, workfare participants may find many reasons to pursue such a course of action. The workers' compensation scheme in general is becoming less attractive to workers, for example, as benefit levels are reduced, pensions de-indexed for inflation, and "deemed earnings" provisions applied in questionable manners. In addition, the calculation of a participant's workers' compensation benefits in a wage-loss system based largely on pre-injury earnings presents many problems. Morrison points to the Board's ability to determine the earnings of apprentices, learners, and students under section 14 of Regulation 1102 (R.R.O. 1990) should this be the status of workfare participants, and provides a discussion of this issue in general.<sup>72</sup> He also notes that there is potential for participants merely to be shuffled between workers' compensation and social assistance, and not to their advantage.<sup>73</sup> Should this prove to be the

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70. (17 July 1995) No. CV92 0518876S (Conn. Super.), 1995 Westlaw 441880, 1 [hereinafter *Blum*].

71. *Ibid.* at 3.

72. *Supra* note 17 at 26ff.

73. *Ibid.* at 27.

case, workers may have nothing to lose financially by leaving the no-fault workers' compensation system, and perhaps much to gain under the fault-based tort system in the areas of non-economic and punitive loss. Of course, this assumes an ability to access the civil court system, which may be highly questionable for a person in the position of an injured workfare participant.

### **The WCB's Position on Workfare**

The discussion on workfare and workers' compensation thus far has focused on the situation in the absence of statutory intervention. As noted previously, the government has already passed legislation on this matter in relation to both the OHSA and the ESA. The question might arise as to why this was not done with regard to the WCA.

The reason appears to be that the government saw no need to do so.<sup>74</sup> The Ministry of Community and Social Services did approach the Board for an opinion about where workfare participants fit into the workers' compensation scheme. The Board took the view that workfare participants fall within its policy guidelines dealing with persons on unpaid training placements, and therefore are covered by its general funding agreement with the government. Pursuant to this agreement, the government is responsible for paying all accident costs of workfare participants.<sup>75</sup> The employers of the workfare participants, according to the Board, are the participating organizations (who are therefore protected from legal liability), while the government remains responsible for the costs associated with workfare injuries.

However, the Board's approach has many shortcomings. The definition of "worker" under the WCA does include "a learner or student", with the following definitions given for those terms under section 1 of the Act:

"learner" means a person who, although not under a contract of service or apprenticeship, becomes subject to the hazards of an industry within the scope of Part I for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment

...

"student" means a person who is pursuing formal education as a full-time or part-time student and is employed by an employer for the purposes of the employer's industry, although not as a learner or apprentice

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74. Interview by telephone with Elizabeth Brown, Counsel, Workers' Compensation Board Legal Branch (29 November 1996) Toronto.

75. The Crown is an employer falling under Schedule 2 (paragraph 9) of the WCA.



Workfare participants clearly are excluded from the definition of student. And, while perhaps less obviously so, they are also well outside of the Act's definition of learner, which requires that the work in question must be stipulated by the employer and be preliminary to employment. While eventual employment for workfare participants may be a hope of the program administrators, it can be little more than that. From the standpoint of participating organizations, there is surely almost no chance or even intention of hiring the multitude of social assistance recipients who will be required to participate in workfare.

While it is probably impossible to get around the above definitional obstacle, the only chance of doing so would be for program administrators to ensure that workfare participants are carefully matched to placements based on the skills they possess. As Ian Morrison explains:

There is a fundamental ambiguity at the heart of the *Community Placement* program as to whether the program is a means for people to contribute work of value to the community or a training/work experience program. If it is the former, people should be selected to participate based on their current knowledge and skills. If it is the latter, people should be assigned to learn something that they don't know how to do, and someone will have to teach them.<sup>76</sup>

The Program Guidelines claim that it is both:

The purpose of Community Participation is to enable participants to contribute to their community while receiving social assistance and to build some basic networks, valuable experience, and employment-related skills to help them move into the paid labour force.<sup>77</sup>

The government has provided examples of the types of placements through which these goals can be met:

Participants could clean up garbage and old logs from area rivers and streams. ... Participants could help clean up local lakes and restore barren lands by planting trees. ... Participants could develop and maintain snow-mobile trails. ...<sup>78</sup>

It is interesting to compare these activities to those of the stone-breaking, wood-chopping poor of the 1880s. One might be excused for finding irony in the words of then-Minister of Community and Social Services David Tsubouchi

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76. Morrison, *supra* note 17 at 2.

77. "Program Guidelines", *supra* note 9 at 10.

78. Ministry of Community and Social Services, News Release 96-24, "People Will Work for their Welfare Cheques Starting this September" (12 June 1996) at 5.

that "[w]e are truly moving social assistance in this province from a hand-out to a hand-up".<sup>79</sup>

In the end, the WCB's view on the status of workfare participants is fundamentally flawed. It is supported neither by the WCA itself nor by the nature of the workfare program and the relationships constructed by it. Workfare participants are not trainees under the Act, and any analysis of their status must be approached in the manner set out previously.<sup>80</sup>

### III. WORKFARE: SOME ALTERNATIVE PERSPECTIVES

The discussion thus far has proceeded on the basis that workfare constitutes "employment", both under common law and remedial workplace safety legislation. However, it remains possible for the courts to conceive of this relationship differently. This section will explore alternative perspectives of the legal status of workfare and workfare participants in such an eventuality. But even if the previous conclusions are correct and workfare participants are employees, the following discussion serves a useful purpose in further illuminating the nature of the workfare relationship. This will be particularly helpful in assessing the legal status of workfare participants in areas in which they are not covered by statute, for example, in the area of employment standards legislation.<sup>81</sup>

The discussion continues to focus on the rights of workfare participants, especially in situations where they suffer injury at work. Their rights under tort law will be explored, which once determined, will help us to understand the corresponding duties owed to them. Again, it will be important to understand who the masters<sup>82</sup> of workfare participants are. The article will proceed to reason by

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79. *Ibid.* at 1. As Ontario Works slowly unfolds, a better picture is developing of the types of workfare placements which are actually being implemented. A "Community Placements Update" by Bob Barraclough, Placement Coordinator in North Bay, lists tour guide, office clerk, outdoor science facilitators, maintenance workers, chainsaw operator trainees and troubleshooting mechanic among its approved placements as of January 16th, 1997.

80. This conclusion is strengthened by the fact that most workfare placements will be limited to six months, with only those having specific training programs in place being allowed to last up to a maximum of eleven months: see text accompanying note 13.

81. Although it will not be dealt with in this article, it should be noted that workfare participants likely do fall under the protection of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, which is an important source of workplace rights. This is certainly the view taken by the government: see "Program Guidelines", *supra* note 9 at xi (Appendix C). For a concurring opinion which also highlights some potential concerns in this area, see Morrison, *supra* note 17 at 13ff.

82. The term "master" is not ideal, but may be the best of available options. It is recognized that the common law relationship of "master and servant" implied an employment rela-

analogy, beginning with workfare participants in relation to volunteers, occupiers' liability, and finally workhouse paupers under the English Poor Law.

### A. *Volunteers*

There have been some suggestions that the legal status of workfare participants resembles that of volunteers. Yet, intuitively there appear to be many differences between the two. Mandatory work in exchange for social assistance does not quite capture the seemingly altruistic spirit of traditional voluntarism.<sup>83</sup> *Black's Law Dictionary* defines "volunteer", *inter alia*, as:

A person who gives his services without an express or implied promise of remuneration. One who intrudes himself into a matter which does not concern him . . . when he is not legally or morally bound to do so<sup>84</sup>

A distinction between workfare and voluntarism has already been made in Regulation 385/96, made pursuant to the OHSA.<sup>85</sup> Even people in the volunteer sector are keen to maintain the difference.<sup>86</sup> Yet some might argue that applying for social assistance is a voluntary act, and therefore, by extension, so too is any work undertaken as a result thereof. But such a conclusion is soundly rejected by all existing authority on the matter.

*Tozeland v. Guardians of the Poor of the West Ham Union*<sup>87</sup> is a case on point. The decision of the English Court of Appeal in this case will soon be considered in some depth, but for the moment we will concentrate on the ruling of the

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tionship—precisely what is sought to be avoided here. Nonetheless, several cases pertaining to the Poor Law adopt the term to refer to a person who has control over a pauper in a workhouse, even though this was not considered to be "contractual employment". Slavery imports yet another meaning to the word. *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West, 1990) defines "master", *inter alia*, as "[o]ne having authority, one who rules, directs, instructs, or superintends". It will therefore be used in this discussion.

83. For a critical discussion of workfare as it pertains to voluntarism, see *Workfare Watch*, vol 1:3 (Social Planning Council of Metropolitan Toronto, November 1996). This organization also serves as a repository of workfare-related information, including resolutions from the volunteer sector opposed to workfare, much of which has been made publicly available via the internet: see <http://worldchat.com/public/tab/wrkfrw/wrkwtch.htm>.
84. *Supra* note 82.
85. See Part II(b), above.
86. See J. Gadd, "Workfare puts Volunteering at Risk, Report Warns: People Likely to Balk at Being Mistaken for Forced Workers Under Confusing Ontario Plan, Groups Say" *The [Toronto] Globe and Mail* (24 October 1996) A7.
87. [1906] 1 K.B. 538.

Divisional Court on the matter of the doctrine of common employment, with which the Court of Appeal was in full agreement.<sup>88</sup> The issue was whether the doctrine of common employment was a defence to an action arising from injury caused to a pauper in the course of workhouse duties. Lord Alverstone C.J. held:

When a pauper goes into the workhouse he does not know what work he may be called upon to perform, and it seems to me an unjustifiable extension of the doctrine of common employment to say that for a man to go in a starving condition into the workhouse is equivalent to a contract on his part to do any work that he may be ordered to do as though he were a servant who could refuse to do it. The option or choice which the servant has to exercise must be an option or choice with reference to the work, and I cannot think that we are at liberty to disregard the compulsion of hunger, which drives a man into the workhouse, and to say that under such circumstances a man goes into it voluntarily in the sense in which a servant voluntarily enters an employment.<sup>89</sup>

Ridley J. agreed, expressing it this way:

Then it was contended that the plaintiff was only a volunteer, and in one sense that is true: he was a volunteer in so far as he got into the workhouse by his own voluntary act, but he was not a volunteer as to the work which he should do as an inmate, and the application of the doctrine of common employment must depend on his voluntary consent to that work; the doctrine cannot apply merely because at an antecedent period he voluntarily entered the workhouse.<sup>90</sup>

Although only two cases on this point were found in a search of American workfare jurisprudence, both are supportive of the notion that workfare participants are not volunteers. In *Blum*, which was quoted under the discussion about workers' compensation, the Court pointed to the lack of free choice workfare participants have in relation to their placements in preserving for them the right to sue.<sup>91</sup> Although not quite on point, another recent American case that speaks to the nature of the workfare relationship is *Manley v. YMCA of Plainfield*.<sup>92</sup> In *Manley*, the YMCA argued that charitable immunity status protected it from being sued by a workfare participant injured during a placement there. The "Y"

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88. See *Tozeland*, *infra* note 101 at 923. The Court of Appeal overturned the decision of the Divisional Court on other grounds.

89. *Supra* note 87 at 544.

90. *Ibid.* at 547.

91. *Supra* note 70.

92. 646 A.2d 1163 (N.J.Super.L. 1994) [hereinafter *Manley*].

apparently argued that providing the participant with a placement enabled him to obtain social assistance, and that he therefore was a beneficiary of its charity. The judge held contrariwise:

Permitting someone to perform labor free of charge, as a condition to receiving welfare benefits, cannot by any stretch of the imagination equate with the plaintiff himself receiving a benefit from the YMCA . . . it was the plaintiff who was rendering a benefit to the defendant, not the other way around. The true beneficiary of the YMCA's charitable work was the City of Plainfield Welfare Department which required the plaintiff to work as a condition for benefits. The plaintiff was in effect no different from the employee . . . who was obligated to engage in work at the direction of his employer<sup>93</sup>

The Court seemed to be acknowledging the compulsion inherent in a workfare relationship, again displacing the notion of voluntariness.

Therefore, it would appear that the law as it pertains to volunteers cannot be taken as a guide to the law as it pertains to workfare participants. Regardless of from what perspective one considers the question—common usage, common sense,<sup>94</sup> or common law—the result is the same: workfare participants are forced to labour for their benefits and cannot be considered volunteers.<sup>95</sup>

### B. *Occupiers' Liability*

In any event, workfare participants will be owed a duty of care under the *Occupiers' Liability Act*<sup>96</sup> (OLA). The fact that we have returned to the common law to ascertain some aspects of the workfare relationship does not mean that we should also do so for the purposes of occupiers' liability. Although a large body of common law exists in relation to dangerous premises, section 2 of the OLA specifies that the Act supersedes the common law. And while section 9(2) of the OLA makes it clear that the Act does not affect "the rights, duties, and liabilities resulting from an employer and employee relationship where it exists", we are proceeding on the assumption that such a relationship does not

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93. *Ibid.* at 1165.

94. The reference is to Ontario Regulation 385/96, which statutorily defines "volunteer". The legislation was passed by Ontario's Progressive Conservative government, which was elected in June 1995 under the slogan of the "Common Sense Revolution".

95. An interesting aside, however, is that social assistance recipients for whom Ontario Works is not mandatory (such as seniors and persons with disabilities) may nonetheless participate on a *voluntary* basis. They would not be subject to sanction for failure to fulfil any of the program goals. *Quaere* the legal status of these participants.

96. *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 [hereinafter OLA].

exist, neither under common nor under statute law. In any case, it may well be that an employment relationship would only serve to augment these duties, for example, through the OHSA.

Under the common law, the duty of care owed by an occupier to an entrant upon land was less stringent than that required by the law of negligence. The status of the entrant determined the requisite standard of care, with there being three main categories: invitees, licensees and trespassers. Section 3(1) of the OLA, subject to limited exceptions in section 4, replaces the common law with the following duty:

An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

Furthermore, section 3(2) makes it clear that this duty “applies whether the danger is caused by the condition of the premises or by *an activity carried out on the premises*.”<sup>97</sup> Therefore, the activities required of workfare participants by their placements or otherwise ongoing at the worksite will be subject to the occupier’s duty to ensure that the premises are “reasonably safe”. Furthermore, one might argue that standards established under such statutes as the OHSA represent the best guide as to what constitutes “reasonable” for the purposes of the OLA in relation to employment-type activities.

Section 4(1) of the OLA states that the duty of care provided for in subsection 3(1) does not apply “in respect of risks willingly assumed by the person”, in which case the duties are only “to not create a danger with the deliberate intent of doing harm or damage” and “to not act with reckless disregard of the presence of the person” on the premises. One might argue that workfare participants, by entering the premises of their workfare placements, willingly assume the risks thereof. However, this returns us to the discussion that took place earlier with regard to volunteers, in particular the discussion pertaining to the doctrine of common employment. The argument will not be repeated here, but it is directly on point in holding that persons in the positions of workfare participants do not voluntarily, or “willingly”, assume any risks associated with their work.

Finally, section 5 of the OLA addresses the ability to contract out of the duty imposed under the Act. It is possible that service delivery agents may attempt to excuse participating organizations from liability under the OLA in their

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97. Emphasis added.

placement agreements. However, subsection 5(1) strictly forbids this possibility:

The duty of an occupier under this Act, or the occupier's liability for breach thereof, shall not be restricted or excluded by any contract to which the person to whom the duty is owed is not a party, whether or not the occupier is bound by the contract to permit such person to enter or use the premises.

On the other hand, subsection 5(2) of the OLA does allow for contracts to *extend* liability to third parties *beyond* the standard of reasonable care, including liability for the actions of persons not under the occupier's direction or control. While this is not likely to become a prominent feature of placement agreements, it may be appropriate for particular workfare placements and should remain open to further consideration.

In summary, the OLA imposes a standard of reasonable care on the occupier of premises. Whatever other regime covers workfare participants, they will also be protected by the terms of this Act.

### C. *Workhouses, Paupers, and the English Poor Law*

The final category which will be examined is that of paupers under the English Poor Law.<sup>98</sup> We have already considered some material from this era as it relates to the "voluntary" nature of workhouse labour. Although the cases to be examined were decided under statute, the legal relationships in existence at that time bear remarkable similarity to those which exist today with regard to workfare. Considerable attention will therefore be devoted to the case law which developed as a result, as it may well serve an important role in interpreting the legal situation of present-day workfare participants in Ontario.

Perhaps unsurprisingly, cases decided under the Poor Law are few and far between, notwithstanding its 300-year history.<sup>99</sup> Undoubtedly, access to justice for the poor was even worse in Poor Law England than it is now in Ontario.<sup>100</sup>

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98. An extensive amount of literature exists about the Poor Law. General historical accounts include: J.J. Bagley & A.J. Bagley, *The English Poor Law* (London: MacMillan Press, 1966); P. Slack, *The English Poor Law 1531-1782* (London: MacMillan Press, 1990); and M. E. Rose, *The English Poor Law 1780-1930* (New York: Barnes & Noble, 1971).

99. See *Dunbar v. Ardee Guardians*, [1897] 2 I.R. 76 at 84, where Fitz Gibbon L.J. refers to the "paucity of authority".

100. In this regard, see *Poverty in Canada: Report of the Special Senate Committee on Poverty* (Ottawa: Information Canada, 1971), where the Committee quotes from the brief of Osgoode Hall Law School's *Community Legal Aid and Services Program* at 147:

"Those of you who are lawyers and those of us who are students look at the *Canadian*

Nonetheless, some cases did make it to the courts, and the decision of the English Court of Appeal in *Tozeland v. Guardians of the Poor of the West Ham Union*<sup>101</sup> is instructive for present purposes.

To understand *Tozeland*, and how it relates to present-day workfare in Ontario, some knowledge of the workhouse system is required. Like the Community Participation component of Ontario Works, workhouses under the Poor Law envisioned a series of complex relationships.<sup>102</sup> Local Government Boards were created and given responsibility (by statute) to direct and oversee the administration of relief to the poor. "Poor Law Commissioners" sat on these Boards, and one of their powers was the ability to form and dissolve "unions". These unions had many functions, in particular the building and administering of "workhouses". "Guardians" were elected to direct the unions, and included among their responsibilities was (upon the direction of the Commissioners) the appointment of "officers", who were paid employees, to assist in running the workhouses.

The parallels between the Poor Law and present-day workfare are very strong. The role of local government boards can be likened to that of service delivery agents under Ontario Works. Both bodies are responsible for implementing a statutory program of aid to the poor, including the requirement of work in exchange for "relief". While local government boards then contracted with unions to deliver and administer the program, service delivery agents will enter into placement agreements with participating organizations to much the same end. Then, just as paupers performed labour in the union workhouses, workfare participants will labour for participating organizations. Workhouse officers correspond to the employees of participating organizations, with union guardians corresponding to participating organizations' directors. One significant difference is that under the Poor Law the boards had the power to form and

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Income Tax Act and see thousands and thousands of cases where points in dispute in that act have been clarified by the Courts and the Tax Appeal Board. If you look at the *General Welfare Assistance Act* in Ontario, there is not a single case that has ever been litigated under that act. [ . . . ] And, surely, we are not to conclude from that that there were no problems in interpretation. Surely what we are to conclude is that the poor whose lives are substantially ruled by people who have control over the funds . . . have never had an opportunity to have their rights interpreted."

The situation has undoubtedly improved with the establishment of community legal clinics in Ontario over the past 25 years, but even now significant obstacles to the poor remain. Meanwhile, the clinic system and its funding are under threat from government cutbacks.

101. [1907] 1 K.B. 920 (C.A.) [hereinafter *Tozeland*].

102. See generally *ibid.* at 924.



dissolve unions, whereas in Ontario the participating organizations will already exist in the public or non-profit sector independent of the service delivery agents' will. With this basic knowledge, we can now turn to the case at hand.

**Tozeland**<sup>103</sup>

Mr. Tozeland was a fifty-seven year old man, a cigar-box maker by trade. He had been an "inmate" of a workhouse for just over three months. One day, Mr. Tozeland was directed to assist an official of the workhouse, Byers, who was an electrician, in some work pertaining to a recently installed electric light in the workhouse infirmary. The work was being performed under the supervision of a man by the name of Baird, also a workhouse official, who was the infirmary's engineer. A staging had been made consisting of a board supported by a pair of steps at one end and a ladder at the other. Unfortunately, while Mr. Tozeland was working on the staging, it collapsed, throwing him to the ground. As a result of his injuries, his leg had to be amputated. It was admitted that Baird was responsible for the security of the staging, and he was subsequently found guilty of negligence. Mr. Tozeland sued Baird's employer—the guardians of the workhouse union—for damages.

At trial, the county court judge found "that the case could not be put more favourably for the plaintiff than as one of master and servant",<sup>104</sup> and that since Baird was an employee of the workhouse, the doctrine of common employment applied and was a defence to the action. This was overturned on appeal to the Divisional Court, which held that the doctrine of common employment did not apply because the plaintiff was not in a position to voluntarily take upon himself the risk of injury.<sup>105</sup> Judgement was given in favour of Mr. Tozeland. The guardians appealed further.

The decision of the Court of Appeal essentially hinged on the nature of the relationship between Mr. Tozeland and the poor law guardians. The President of the Court, Sir Gorell Barnes, referred to "[t]he exceptional character of a case of this kind"<sup>106</sup> due to overall control of the situation being given by statute to one body, with the actual power of carrying out the arrangements assigned to another, which is to say the relationship of the Local Government Board to the guardians of the union. On this point, the Court relied extensively on a case of a similar nature decided by the Irish Court of Appeal, *Dunbar v. Ardee Guard-*

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103. *Ibid.*

104. *Supra* note 87 at 539.

105. See Part III(a), above.

106. *Tozeland*, *supra* note 101 at 924.

ians<sup>107</sup>, in which the plaintiff sued the guardians for negligence which resulted in the death of her son, a patient in a workhouse infirmary. President Barnes cited with approval the following passage from Fitz Gibbon L.J. of the Irish Court of Appeal:

I think the idea would never occur to anyone entering a workhouse hospital that the guardians were further liable to insure the recipient of relief against the negligence of the persons employed to give it. Such persons would be liable for their own acts or defaults, but I cannot hold that those personal acts or defaults of the subordinates are, in law, the acts of the guardians, nor are they acts which the guardians . . . assumed the responsibility of doing through their servants. . . . the guardians are not answerable, in damages, for any injury caused by the neglect or default of the master in the discharge of what were his duties under the statutes and regulations affecting his office.<sup>108</sup>

President Barnes then continued in his own words:

there may be a difference at first sight between the duty to look after him [a workhouse infirmary patient] as a person who wants food and care and the duty to look after him as a person who is employed in work in which the guardians are authorized to employ him. But, after reflecting over this case, I fail to see any distinction in principle between the obligation in one respect and the obligation in the other. . . It seems to me it is all part of the administration of the poor law relief, and that the action is not maintainable either in the one case or in the other.<sup>109</sup>

In other words, guardians of the poor are not liable for injuries caused by the negligence of union officers properly employed to discharge statutory duties towards the poor. Thus did President Barnes allow the appeal and dismiss Mr. Tozeland's action.

The case of *Tozeland* is interesting in at least two other respects. First, as discussed earlier, the Court of Appeal affirmed that the doctrine of common employment was not applicable under the circumstances of this case. The words of Lord Farwell in this regard are instructive on the nature of workhouse employment in general:

the doctrine of common employment has no application to the present case, on the ground that such doctrine rests on the contractual relationship existing between master and servant, an implied term of which is that the servant takes the risks arising from his fellow-servants' negligence. In the

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107. *Supra* note 99.

108. *Ibid.* at 91; *Tozeland*, *supra* note 101 at 931.

109. *Tozeland*, *ibid.*

present case there is no contractual relationship, the guardians employ the man in performance of their duty under the Poor Laws Acts . . . *The employment is therefore not contractual, but statutory.*<sup>110</sup>

Lord Farwell elaborated further about the responsibilities that arise from work-house relationships:

Whatever may be the rights of third persons against guardians, the relation of the Local Government Board, the guardians and their officers, and the paupers to one another is regulated by statute in such a manner that the ordinary considerations arising out of the relation of principal and agent and master and servant have no application. . . . the pauper works under statutory compulsion, not under any contractual relationship.<sup>111</sup>

Lord Buckley agreed:

The proper administration of the poor law is, of course, a matter to be enforced. The question, however, is whether a pauper, in an action brought against the guardians in their corporate capacity, is a person capable of enforcing it. In my opinion he is not. The guardians no doubt owe the duty of providing the pauper with proper and sufficient food, with buildings of proper construction, with proper sanitary arrangements, and the like. But, as [a] matter of public policy, it would be impossible that a pauper should be entitled to bring his action against the guardians for default to do so. That is a matter to be controlled by the Local Government Board.<sup>112</sup>

Finally on this point, it is worth considering the synopsis given by the leading authority on the law of negligence at the time, Thomas Beven, the second edition of whose book on negligence was relied upon by the Court of Appeal in *Tozeland*. By the time the fourth edition had rolled off the presses, Mr. Beven had this to say:

the soldier has voluntarily contracted himself out of his civil rights; the convict has forfeited them; but parish relief is a phase of the State's economic administration which in the interest of the community is dispensed where there is no fault and sometimes no wish to receive it. The pauper, therefore, does not lose any civic rights beyond those specified by legislation. In the event of injury being inflicted on him he is in no other position than those injured by the act of employes in any other State department<sup>113</sup>

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110. *Ibid.* at 932 [emphasis added].

111. *Ibid.* at 933.

112. *Ibid.* at 935.

113. T. Beven, *Negligence in Law*, 4th ed., vol. 1 (London: Sweet & Maxwell, 1928) at 325.

It therefore seems that workfare participants will be owed minimum duties from the participating organizations for whom they perform labour. Unlike unions and their guardians, however, participating organizations and their directors will not be protected from the negligence of their employees because the organizations are not created by statute exclusively for workfare, but exist independently thereof. They will therefore not enjoy protection from suit by workfare participants, and will be liable for any negligence of their employees—including perhaps, the negligence of other workfare participants. Like the workhouse cases, the doctrine of common employment does not apply because the principle of freedom of contract is absent from this statutory compulsion of labour. This means that “voluntary assumption of risk” is similarly inapplicable. Less clear is whether the common law defence of contributory negligence is still available to defend an action brought by a workfare participant. The general rule is that persons are responsible for any harm that they cause to themselves: *quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire*. However, in the case of workfare this may be overshadowed by the involuntariness of the participants’ position in the first place, a notion which may do fundamental harm to the principles underlying contributory negligence. Finally, like the workhouse cases, employees of the participating organizations remain liable for any negligence on their part that results in harm to a workfare participant.

It is possible that the position of service delivery agents will be different. Staying within the rubric of the workhouse system outlined previously, it is imaginable that as long as service delivery agents are acting within the course of their statutory duties, they will be able to raise the defence of “statutory authority” in suits by workfare participants. This defence would probably not be available to participating organizations because they are under no legal obligation to participate in workfare. But in any event, case law suggests that the courts would be unwilling to allow this defence to protect a party negligent in the performance of its duties.<sup>114</sup>

The second respect in which *Tozeland* is worthy of further note is with regard to the discussion of the liability of guardians to third parties. While comments to this end were *obiter dicta*, the Court briefly explored the liability of guardians for harm arising from the actions of the workhouse. The role played in such actions by paupers was not directly commented upon, but it can only be assumed that actions of paupers in connection with their workhouse responsibilities

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114. See *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181, 64 D.L.R. (4th) 620, and *Schenck v. Ontario*; *Rokeby v. Ontario* (1981), 34 O.R. (2d) 595, 131 D.L.R. (3d) 310 (Ont. H.C.). Nonetheless, this point should be reviewed carefully before a decision is made to opt out of the workers’ compensation system.

would be subsumed under the larger corporate identity of the workhouse. From the judgement of Lord Buckley:

If the question were whether the guardians could be sued in their corporate capacity in a civil action by a third party for such acts as nuisance by pollution, or by noise, or by interference with light, it may well be that an action will lie. . . . The question there was not one of negligence in ministerial duty, but one of injury to the property of a third party.<sup>115</sup>

President Barnes also touched upon this subject, but really only to distinguish some of the authorities put before him from the case at bar. Nonetheless, in the cases he cited, the third-party plaintiff was allowed to recover. President Barnes noted:

Again, that is a case of a claim made by an outside person, for a wrong done by the board as a board, there being no relationship whatever between the two parties to the action: it is an independent wrong.<sup>116</sup>

And commented further:

They are cases of a claim by an outside person who has nothing to do with the administration of the poor law relief, and who does not by virtue of his coming in as a pauper place himself in any way under the provisions of the statutes, and the question is quite different from that which arises in a class of cases in which the person who is complaining is a person in the workhouse, whose relationship to the defendants is governed by the whole of the statutes and regulations which relate to the administration of the poor law relief.<sup>117</sup>

Thus, even under the principles established by the more restrictive statutory system of Poor Law England, participating organizations will face liability to third parties for any harm caused by their workfare participants.

Finally, it must be noted that much of the common law decisions in relation to paupers were based on public policy, which the courts interpreted as necessitating the restriction of the ability of paupers to sue for damages. It could be that public policy as interpreted by the courts has become more sympathetic to workers and the indigent since those days. On the other hand, a recent American workfare case may suggest otherwise, in a situation where a workfare participant

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115. *Tozeland*, *supra* note 101 at 934.

116. *Ibid.* at 928.

117. *Ibid.* at 932.

was denied status as an employee for unemployment insurance benefits but not for the purposes of workers' compensation:

Public policy encourages participation in work relief as a way of transferring employable persons from the welfare dole to the employment role. If a participant is injured while on a work relief job, to deny him employee status which then precludes his receipt of workers' compensation would discourage participation in work relief—and undesirable effect. While to deny employee status to work relief participants under the Unemployment Insurance Code would have a beneficial effect—to encourage employment.<sup>118</sup>

Nonetheless, statutory intervention has significantly altered the employment relationship since the time the workhouse cases were decided in England. In reaching a decision today on these matters, public policy and the common law in Ontario will surely keep pace with at least some of these changes, and not rely strictly on century-old ideas and beliefs.

#### IV. CONCLUSION

Workfare constitutes employment under the common law, and workfare participants are employees. However, devoid of context it is difficult to know who the employer is. Workfare participants are also encompassed within the meaning of "worker" under the OHSA and the WCA, both of which are remedial legislation. The bigger question is who the employer is under each of these acts. It was determined that participating organizations are the employers for the purposes of the OHSA, with service delivery agents sharing liability for fulfilment of the Act's provisions. For the purposes of the WCA, the service delivery agents are the employers. Nonetheless, despite the WCA it may be possible for workfare participants to maintain their civil rights to sue as a result of the special nature of their employment relationship, in which case participating organizations and service delivery agents will be jointly and severally liable for damages.

Whether or not workfare is found to constitute employment for the purposes of labour legislation, it is beneficial to have a deeper understanding of the nature of workfare and its place in relation to our law. One method of pursuing this task is to reason by analogy to the legal position of other classes of persons in society, and this was done with regard to volunteers, occupiers' liability, and workhouse paupers in Poor Law England.

Despite some suggestions to the contrary, workfare participants are not in the same position as volunteers. The work that they perform is required of them in

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118. *Ghent*, *supra* note 64 at 634.

exchange for their benefits and is therefore not given of free will, which is essential to a finding of voluntariness. Workfare participants are covered by the *Occupiers' Liability Act*, however, and a "reasonable" duty of care is owed to them under its terms. In all likelihood, this duty would be based on other existing standards in the area, most notably, the OHSA. Finally, the position of workfare participants is remarkably similar to that of workhouse paupers. The principles enunciated in cases decided in that context serve as a very useful guide to interpreting the nature of the workfare relationship today. The cases are especially important in making clear that persons who perform work in exchange for social assistance do not thereby forfeit their civil rights nor do they take upon themselves all of the risks associated with their work.

It was noted in the introduction to this article, and remains true at its conclusion, that workfare is in a "legal grey area". Workfare participants perform labour as a condition of eligibility for the social assistance benefits to which they are entitled by law. There is an inherent lack of voluntariness in this arrangement, which is fatal to any notion of a contract of employment.<sup>119</sup> Workfare participants are therefore workers *sui generis*, and as such require special legislated standards. Absent such clarity, all parties to workfare—government, service delivery agents, participating organizations, and participants themselves—face uncertainty and a great deal of risk. As the most vulnerable of these parties and the only one which has not participated voluntarily, ambiguities should be resolved in favour of workfare participants, particularly in so far as it means not detracting from their existing civil rights.

Furthermore, in legislating special standards for workfare participants, governments must not derogate from the rights and protections of ordinary wage-labourers and citizens. Again, the compulsion underlying the workfare relationship is the major reason for this. It would be inapposite to a labour system essentially based on freedom of contract—yet which nonetheless recognizes the need to legislate minimum standards—to then deny these standards to the workers who are least free of all.<sup>120</sup>

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119. This is not to suggest that ordinary wage-labourers enter voluntarily into truly free contracts of employment, especially when the *official* national unemployment rate hovers around 10%.

120. While the question was not pursued in this article, it is worth noting that O.Reg. 384/96, which excludes workfare participants from the ESA, does not appear to be subject to the same type of challenge to its *vires* as does O.Reg. 383/96 under the OHSA. This is because s. 84(1)(4) of the ESA allows for the exclusion by regulation of any "class of employers or employees". Nonetheless, *quaere* whether workfare participants constitute the type of class intended by the Act.